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Miles Q. Fiterman Revocable Trust and the Miles Q. Fiterman  
Non-Exempt Marital Trust; Karen Wasserman; Lynn Guez;  
Stephanie Rosenthal; Miles Q. Fiterman II; and Matthew  
Fiterman*

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

**Securities Investor Protection Corporation,**

Plaintiffs-Applicant,

v.

**Bernard L. Madoff Investment Securities LLC,**

Defendant.

In re:

**Bernard L. Madoff,**

Debtor.

SIPA Liquidation

No. 08–01789 (SMB)

(Substantively Consolidated)

**Irving H. Picard**, Trustee for the Liquidation of  
Bernard L. Madoff Investment Securities LLC,

Plaintiff,

v.

**Miles Q. Fiterman Revocable Trust; Miles Q.  
Fiterman Non-Exempt Marital Trust; Towers  
Management Company LLC; Fiterman GST Exempt  
Marital Trust; Miles Fiterman Family Trust; Shirley  
Fiterman**, individually, and in her capacity as Trustee  
for the **Miles Q. Fiterman Revocable Trust** and the  
**Miles Q. Fiterman Non-Exempt Marital Trust;**  
**Steven Fiterman**, individually, and in his capacity as  
Trustee for the **Miles Q. Fiterman Revocable Trust**  
and the **Miles Q. Fiterman Nonexempt Marital Trust;**  
**Valerie Herschman**, individually, and in her capacity  
as Trustee for the **Miles Q. Fiterman Revocable Trust**  
and the **Miles Q. Fiterman Non-Exempt Marital  
Trust; Karen Wasserman; Lynn Guez;  
Stephanie Rosenthal; Miles Q. Fiterman II; and  
Matthew Fiterman**,

Defendants.

Adversary Proceeding

No. 10-04337 (SMB)

Jury Trial Demanded

**MEMORANDUM OF LAW IN SUPPORT OF  
DEFENDANTS' MOTION TO DISMISS  
THE FIRST AMENDED COMPLAINT**

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### PRELIMINARY STATEMENT

In this proceeding, Trustee Picard is suing the trusts and family of the late Miles Q. Fitterman, admittedly innocent Madoff customers, to claw back alleged profits earned over the course of their investment. Based on consolidated briefing applicable to this and other similar adversary proceedings, Judge Rakoff for the Southern District of New York has previously dismissed Counts Two through Six of the Trustee's Amended Complaint. Judge Rakoff's ruling is currently on appeal to the Second Circuit.

The Trustee's remaining claims for avoidance and recovery of alleged actual fraudulent transfers (Counts One and Seven) and disallowance of related customer claims (Count Eight) are insufficiently pled and, therefore, subject to dismissal. Specifically, the Amended Complaint demonstrates that the trust that received the alleged initial transfers from Madoff was not only a good-faith transferee, but also a "financial participant" that is deemed to have provided value for the alleged transfers under the Bankruptcy Code (the "Code") section 548(d)(2)(B). Because the Amended Complaint demonstrates that the alleged initial transfers are protected by section 548(c), Counts One and Seven must be dismissed in their entirety.

Counts One and Seven are also defective because the Trustee has not sufficiently pled a current shortfall in funds needed to satisfy all allowed customer claims, which is a prerequisite under the Securities Investor Protection Act for standing to utilize the Code's avoidance and recovery powers. Because the Trustee lacks standing to bring this adversary proceeding, Counts One and Seven must be dismissed in their entirety.

Even if the Amended Complaint sufficiently pled a claim to avoid alleged initial transfers, the Trustee's claims to avoid alleged subsequent transfers under Count Seven are defective in that they fail to identify which defendant received a subsequent transfer, how much the defendant received, and when the transfer occurred. Because such threadbare

allegations do not put Defendants on notice of what they must defend against, Count Seven must be dismissed as to any alleged subsequent transfers.

Lastly, Count Eight should be dismissed as to MSM Investment because the Trustee has agreed to allow its SIPC customer claim. The remainder of Count Eight, which seeks to disallow the claims of Shirley Fiterman and Fairway Partnership II under Code section 502(d), must also be dismissed because the Trustee has not sufficiently alleged that any Defendant received property that is avoidable or recoverable under the Code. In light of these deficiencies, the Amended Complaint should be dismissed in its entirety.

### **FACTUAL STATEMENT**

**I. The Madoff Trustee is seeking avoidance and recovery of alleged transfers of fictitious profits.**

On December 10, 2010, Irving H. Picard (the “Trustee”), as trustee for the liquidation of the business of Bernard L. Madoff Investment Securities LLC (“BLMIS”) under the Securities Investor Protection Act of 1970 (“SIPA”) and the substantively consolidated estate of Bernard L. Madoff individually (“Madoff”), filed an Amended Complaint (the “Complaint”) against the above-captioned defendants (collectively, the “Defendants”).

The Complaint includes eight counts. Counts One through Six allege actual and constructive fraudulent transfer claims, under both the Code and the New York Debtor & Creditor Law (the “NYDCL”), seeking to avoid and recover alleged transfers of “fictitious profits.” (Complaint ¶¶ 68–105.) Count Seven seeks recovery of the alleged fraudulent transfers (Complaint ¶¶ 106–111), and Count Eight seeks to disallow certain customer claims (Complaint ¶¶ 112–115).

All of these counts relate to transfers into and out of three customer accounts held in the name of the Miles Q. Fiterman Revocable Trust (the “Revocable Trust”) (Account No.

1F0021) or the Miles Q. Fiterman Non-Exempt Marital Trust (the “Non-Exempt Trust”) (Account Nos. 1F0200 and 1T0015). As the Complaint alleges, Miles Q. Fiterman (when alive) settled the Revocable Trust and served as the trust’s co-trustee, along with his wife Shirley Fiterman. (Complaint ¶¶ 3, 13.) As the Complaint alleges, after Mr. Fiterman died in 2004, the assets of the Revocable Trust were distributed to other trusts, including the Non-Exempt Trust. (Complaint ¶ 3.)

For each of the three accounts at issue, the Complaint alleges that “a Customer Agreement, an Option Agreement, and/or a Trading Authorization Limited to Purchases and Sales of Securities and Options” were executed and delivered to BLMIS. (Complaint ¶ 49.)

**II. The District Court dismisses Counts Two through Six of the Complaint, limiting the Trustee to avoiding and recovering transfers that occurred within two years of the Filing Date.**

The Complaint seeks to avoid two groups of alleged fraudulent transfers: (1) transfers BLMIS allegedly made to Defendants during the six years before the December 11, 2008 filing date (the “Filing Date”), which the Trustee seeks to avoid under Code section 544 and the NYDCL (the “Six-Year Transfers”), and (2) transfers BLMIS allegedly made to Defendants during the two years before the Filing Date, which the Trustee seeks to avoid under Code section 548 (the “Two-Year Transfers”). (Complaint ¶¶ 68–105.)

On May 12, 2012, Judge Rakoff for the Southern District of New York dismissed the Trustee’s claims to avoid and recover the Six-Year Transfers. In *SIPC v. Bernard L. Madoff Inv. Sec. LLC (Picard v. Greiff)*, 476 B.R. 715, 722 (S.D.N.Y. 2012), Judge Rakoff held “that § 546(e) bars the Trustee from pursuing the claims here made under § 548(a)(1)(B) and § 544.” Judge Rakoff later consolidated the present adversary proceeding into Case No. 11–cv-7603 (JSR) (the “Fishman Action”) for purposes of entering final judgment dismissing the Trustee’s claims relating to alleged Six-Year Transfers. See Consent Order Granting

Certification Pursuant to Fed. R. Civ. P. 54(b) for Entry of Final Judgment Dismissing Certain Claims and Actions on May 12, 2012 in Case No. 12–mc-115 (JSR) (ECF No. 109) and Case No. 11–cv-8988 (JSR) (S.D.N.Y. 2012) (ECF No. 17.). On May 22, 2012, the District Court entered a Final Judgment Dismissing Certain Claims in Case No. 12–mc-115 (JSR) (ECF No. 124), which dismissed Counts Two through Six in the present adversary proceeding. This order is currently on appeal to the Second Circuit. *See In re Bernard L. Madoff Investment Securities LLC*, Appeal No. 12–2557bk (2d Cir.). This dismissal effectively limited the Trustee to recovering so-called Two-Year Transfers—transfers of fictitious profits during the two-years before the Filing Date.

**III. The Trustee alleges that BLMIS transferred a total of \$38,356,992 in “fictitious profits” to the Non-Exempt Trust in the two years before the Filing Date.**

The Complaint alleges that, during the two years before the Filing Date, BLMIS made four so-called Two-Year Transfers of alleged fictitious profits out of the Non-Exempt Trust’s BLMIS account (Acct. No. 1F0200) totaling \$38,356,992: (1) a December 26, 2006 transfer of \$13,150,000, of which \$9,000,761 is alleged to be “fictitious profits;” (2) an April 20, 2007 transfer of \$13,000,000; (3) a December 26, 2007 transfer of \$3,356,231; and (4) an April 21, 2008 transfer of \$13,000,000 (collectively, the “Two-Year Transfers”). (See Complaint Ex. B.)

Count One of the Complaint alleges an actual-fraudulent-transfer claim under the Code, seeks judgment against the Non-Exempt Trust in the amount of the Two-Year Transfers, and seeks an order against the trustees of the Non-Exempt Trust (Shirley Fiterman, Steven Fiterman, and Valerie Herschman) directing them to facilitate the transfer of the Two-Year Transfers to the estate of BLMIS.

**IV. The Complaint vaguely alleges that the “Initial Transferee Defendants” subsequently transferred “some” avoidable transfers to the “Subsequent Transferee Defendants.”**

The Complaint alleges that, after being transferred from BLMIS to the Initial Transferee Defendants, avoidable transfers were subsequently transferred to eleven “Subsequent Transferee Defendants”:

5. Upon information and belief, the Fiterman Non-Exempt Marital Trust, the Fiterman GST Exempt Marital Trust . . . , the Miles Fiterman Family Trust . . . , Shirley Fiterman, Steven Fiterman, Valerie Herschman, Karen Wasserman, Lynn Guez, Stephanie Rosenthal, Miles Q. Fiterman II, and Matthew Fiterman (“Subsequent Transferee Defendants,” . . . ) received subsequent transfers of the avoidable transfers referenced above.

(Complaint ¶ 5.)

The Complaint fails to allege the amount of the subsequent transfers, but merely states: “Upon information and belief, *some or all* of the Transfers were subsequently transferred by the Initial Transferee Defendants to the Subsequent Transferee Defendants.” (Complaint ¶ 54 (emphasis added).) The Complaint defines the term “Transfers” as referring collectively to the Six-Year and Two-Year Transfers. (Complaint ¶ 51.)

Count Seven, which seeks to recover alleged subsequent transfers, does not specify whether the Initial Transferee Defendants made the alleged Subsequent Transfers to the Subsequent Transferee Defendants directly or indirectly:

108. Upon information and belief, the Subsequent Transfers were transferred by the Initial Transferee Defendants to the Subsequent Transferee Defendants.

109. Each of the Subsequent Transfers was made directly or indirectly to the Subsequent Transferee Defendants.

110. The Subsequent Transferee Defendants are immediate or mediate transferees of the Subsequent Transfers from the Initial Transferee Defendants.

(Complaint ¶¶ 108–110.)

The Complaint does not otherwise identify the amount, date, or recipient of any alleged Subsequent Transfers.

**V. The Non-Exempt Trust’s BLMIS account statements reflected over \$100 million in open securities positions.**

Attached to the Complaint as Exhibit B is a schedule prepared by the Trustee of all deposits and withdrawals for the Non-Exempt Trust’s BLMIS account (Acct. No. 1F0200). Exhibit B shows that the first activity in the Non-Exempt Trust’s BLMIS account was a \$356,594,539 deposit on June 30, 2006. (See Complaint Ex. B at MADC1054\_00000008.) The Non-Exempt Trust’s BLMIS account statement from November 30, 2008 lists the “net market value of open securities positions” as \$383,004,866.35. (Declaration of Thomas Berndt “Berndt Decl.”, Ex. 1 at pg. 1.)

**ARGUMENT**

**I. The remaining counts of the Complaint—Counts One, Seven, and Eight—fail to state claims upon which relief may be granted.**

A complaint may be dismissed to the extent that it fails to state a claim upon which relief may be granted. See FED. R. CIV. P. 12 (b)(6); FED. R. BANKR. P. 7012 (b) (making FED. R. CIV. P. 12(b)–(i) applicable in adversary proceedings). A court considering a motion to dismiss must accept as true all well-pleaded factual allegations in the complaint, drawing all reasonable inferences in favor of the plaintiff. *Bernheim v. Litt*, 79 F.3d 318, 321 (2d Cir. 1996). To survive a motion to dismiss, a complaint must “contain sufficient factual matter, accepted as true, ‘to state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

In deciding a motion to dismiss, courts consider the pleadings and documents attached to the pleadings or incorporated by reference. *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991). Courts may also consider on a motion to dismiss documents not attached to the complaint or incorporated by reference, where the plaintiff has actual notice of and has relied upon the documents in framing the complaint. *Id.* Here the Non-Exempt Trust's monthly BLMIS account statements are cited throughout the Complaint. (See Complaint ¶¶ 1, 37, 39, 41–43.) Exhibit B to the Complaint lists all transactions reported in the Non-Exempt Trust's BLMIS account statements from its inception through Madoff's collapse. (See Complaint at Ex. B.) The Trustee has actual notice (and even possession) of the Non-Exempt Trust's BLMIS account statements and has relied extensively on them in framing the complaint. Accordingly, although they are not attached to the Complaint, the Non-Exempt Trust's BLMIS account statements may be considered by the Court in ruling on this motion, without converting the motion to one for summary judgment.<sup>1</sup> Because all remaining counts of the Complaint fail to state claims upon which relief may be granted, the Complaint should be dismissed in its entirety.

**II. Count One fails to state a claim for actual fraudulent transfer under the Code because the Complaint's allegations show that the Non-Exempt Trust was a good-faith "financial participant" that is protected by Code section 548(c)-(d).**

Count One must be dismissed because it is barred by 11 U.S.C. § 548(c). An affirmative defense may be raised on a Rule 12(b)(6) motion if the defense is based on facts appearing on the face of the complaint. *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 74 (2d Cir. 1998). Here, it is apparent from the face of the Complaint that the alleged initial transferee of the Two-Year Transfers, the Non-Exempt Trust, qualifies for section 548(c) protection.

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<sup>1</sup> The Non-Exempt Trust's BLMIS November 30, 2008 account statement is attached as Exhibit 1 to the Declaration of Thomas F. Berndt ("Berndt Decl.").

Section 548(c) provides an affirmative defense to actual-fraudulent-transfer claims under the Code for transferees who takes for value and in good faith: “a transferee . . . of such a transfer . . . that takes for value and in good faith has a lien on or may retain any interest transferred . . . to the extent that such transferee . . . gave value to the debtor in exchange for such transfer.” 11 U.S.C. § 548(c). The Non-Exempt Trust satisfies both of these requirements because the Non-Exempt Trust’s good-faith is undisputed and because the Non-Exempt Trust is a “financial participant” that is deemed to have provided value for the Two-Year Transfers under 11 U.S.C. § 548(d)(2)(B).

**A. The Non-Exempt Trust’s good faith is undisputed.**

It is apparent that Defendants received the alleged transfers of “fictitious profits” in good faith, given the Complaint’s disclaimer showing its lack of any evidence that Defendants had actual or constructive knowledge of Madoff’s fraud:

To the extent discovery reveals that the defendants were aware, or should have been aware, of irregularities in their BLMIS accounts that would have provided them with inquiry notice of Madoff’s fraud, the Trustee reserves the right to (i) supplement the information regarding the Transfers and Subsequent Transfers and any additional transfers, and (ii) seek recovery of some or all of the full history of principal transfers . . . .”

(Complaint ¶ 57.) Thus, Defendants meet the section 548(c) good-faith requirement.

**B. All of the Two-Year Transfers were for value because they constitute “settlement payments” made to a “financial participant” under 11 U.S.C. § 548(d)(2)(B).**

The Complaint demonstrates that the Non-Exempt Trust took for value under section 548(d)(2)(B), which provides “a . . . financial participant . . . that receives a . . . settlement payment, as defined in section 101 or 741 of this title, takes for value to the extent of such payment.” 11 U.S.C. § 548(d)(2)(B). Section 741(8) defines “settlement payment” as “a preliminary settlement payment, a partial settlement payment, an interim settlement payment, a settlement payment on account, a final settlement payment, or any other similar payment commonly used in the securities trade.” 11 U.S.C. § 741(8). The Second Circuit has described this as an “extremely broad” definition and Judge Rakoff has twice held that “all payments made by [BLMIS] to its customers” qualify as “settlement payments” under 11 U.S.C. § 741. *Enron Creditors Recovery Corp. v. Alfa, S.A.B. de C.V.*, 651 F.3d 329, 334 (2d Cir. 2011); *Picard v. Katz*, 462 B.R. 447, 452 (S.D.N.Y. 2011); *SIPC v. Bernard L. Madoff Inv. Sec. LLC (Picard v. Greiff)*, 476 B.R. 715, 721 (S.D.N.Y. 2012). Because the Two-Year Transfers were payments by BLMIS to a customer, the Non-Exempt Trust, they constitute “settlement payments” under 11 U.S.C. § 741(8).

The Non-Exempt Trust also qualifies as a “financial participant,” which means:

an entity that, at the time it enters into a securities contract, . . . or at the time of the date of the filing of the petition, has one or more agreements or transactions described in paragraph (1), (2), (3), (4), (5), or (6) of section 561(a) with the debtor . . . of a total gross dollar value of not less than \$1,000,000,000 . . . or has gross mark-to-market positions of not less than \$100,000,000 (aggregated across counterparties) in one or more such agreements or transactions with the debtor or any other entity (other than an affiliate) at such time or on any day during the 15-month period preceding the date of the filing of the petition;. . .

11 U.S.C. § 101(22A)(A) (emphasis added). The “agreements or transactions described in paragraph (1), (2), (3), (4), (5), or (6) of section 561(a)” include “securities contracts,” which section 741(7) defines as “a contract for the purchase, sale, or loan of a security.” 11

U.S.C. §§ 561(a)(1), 741(7). The Complaint alleges that the Non-Exempt Trust entered three contracts with BLMIS: a Customer Agreement, an Option Agreement, and/or a Trading Authorization Limited to Purchases and Sales of Securities and Options. (Complaint ¶ 49.) Judge Rakoff has twice held that these three types of agreements that BLMIS entered with its customers qualify as “securities contracts” under section 741(7). *Picard v. Katz*, 462 B.R. 447, 451–52 (S.D.N.Y. 2011) (“Section 741(7) defines a ‘securities contract’ as a ‘contract for the purchase, sale, or loan of a security,’ which is the kind of contract Madoff Securities had with its customers.”); *Picard v. Grief*, 476 B.R. 715, 720 (S.D.N.Y. 2012) (“the account agreements between Madoff Securities and the defendants clearly qualify as securities contracts”). Accordingly, all three types of agreements that the Complaint alleges the Non-Exempt Trust entered with BLMIS constitute “securities contracts” under 11 U.S.C. § 741(7).

The value of the Non-Exempt Trust’s securities contracts with BLMIS meets the \$100,000,000 threshold for a “financial participant” because the Non-Exempt Trust’s BLMIS account statements reflected: (1) gross mark-to-market positions of not less than \$100,000,000 at the time it opened its account and (2) gross mark-to-market positions of not less than \$100,000,000 during the 15-month period preceding the Filing Date.

Exhibit B to the Complaint shows that the Non-Exempt Trust opened its BLMIS account by transferring \$356,594,539 from the Revocable Trust’s BLMIS account. (See Complaint Ex. B at MADC1054\_00000008.) The Non-Exempt Trust’s November 30, 2008 BLMIS account statement—which was issued just eleven days before the December 11, 2008 Filing date—lists the “net market value of open securities positions” as \$383,004,866.35. (Berndt Decl., Ex. 1 at pg. 1.) Because the Non-Exempt Trust’s BLMIS account statement showed that it had gross mark-to-market positions well in excess of \$100,000,000 at the time it was created and just eleven days before the Filing Date, the Non-Exempt Trust qualifies as a “financial participant.” See 11 U.S.C. §101(22)(A).

Even if the BLMIS statements were fraudulent, the Non-Exempt Trust still qualifies as a “financial participant” because “a customer’s ‘legitimate expectations,’ based on written confirmations of transactions, ought to be protected.” *In re New Times Secs. Svcs., Inc.* (“*New Times I*”), 371 F.3d 68, 87 (2d Cir. 2003) (where debtor fraudulently induced customers to purchase fictitious securities, customers had “claims for securities” under SIPA because interpretation of SIPA is informed by customers’ “legitimate expectations”); *see also* *Stafford v. Giddens (In re New Times Sec. Servs.)* (“*New Times II*”), 463 F.3d 125, 129 (2d Cir. 2006) (reaffirming reasoning of *New Times I*); *In re Bernard L. Madoff Inv. Secs. LLC*, 654 F.3d 229, \*20–21 (2d Cir. 2011) (confirming that “a claimant who has ‘written confirmation’ that securities have been purchased or sold on his or her behalf should be treated as a customer with a claim for securities”). *Grieff*, 476 B.R. at 722 (noting, with respect to related Code section 546(e), that “[n]othing in the express language of § 546(e) suggests that it is not designed to protect the legitimate expectations of customers, as well as the securities market in general, even when the stockbroker is engaged in fraud.”).

As such, the Two-Year Transfers were settlement payments received by a “financial participant” and the Non-Exempt Trust, therefore, provided value for these transfers. Because it is apparent from the face of the Complaint that the alleged Two-Year Transfers were taken by the Non-Exempt Trust in good faith and for value, Count One fails to state a claim for avoidance of the Two-Year Transfers.

**III. Count One fails to state a claim for actual fraudulent transfer because the Trustee has not sufficiently pled standing under SIPA.**

Under SIPA section 8(c)(3), codified as 15 U.S.C. 78fff-2(c)(3), the Trustee may only utilize the Bankruptcy Code’s avoidance powers if the customer property is insufficient to pay all customer claims:

*Whenever customer property is not sufficient to pay in full the claims set forth in subparagraphs (A) through (D) of paragraph (1), the trustee may recover any property transferred by the debtor which, except for such transfer, would have been customer property if and to the extent that such transfer is voidable or void under the provisions of title 11.*

15 U.S.C. § 78fff-2(c)(3) (emphasis added). The statute's plain language requires a showing that there is an actual existing shortfall in property necessary to satisfy customer claims.

The Trustee's Complaint does not sufficiently allege such a shortfall. In the Complaint, the Trustee offers the conclusory allegation that "[a]bsent this or other recovery actions, the Trustee will be unable to satisfy the claims described in subparagraphs (A) through (D) of § 78fff-2(C)(1)." (Complaint ¶ 30.) This conclusory allegation is not supported by any alleged facts.

In fact, public records suggest that the Trustee has sufficient property to satisfy all customer claims. On his website ([www.madofftrustee.com](http://www.madofftrustee.com)), the Trustee reports that as of April 1, 2014, the total value of allowed claims was approximately \$11.402 billion.

The Trustee further reports that as of April 1, 2014, he had collected \$9.795 billion for the pool of customer property. Additionally, the United States Department of Justice has announced on the Madoff Victim Fund website ([www.madoffvictimfund.com](http://www.madoffvictimfund.com)) that it will have more than \$4.05 billion in forfeited funds to distribute to victims of the Madoff Ponzi scheme, including payments to satisfy allowed customer claims. Since the definition of customer property is broad, and contemplates multiple sources of customer property, *see* 15 U.S.C. § 78lll(4)(E), the share of the Madoff Victim Fund assets going to satisfy claims filed by SIPC claimants should be included as "customer property." Together, the \$13.845 billion held by the Trustee and the Madoff Victim Fund exceeds the \$11.402 billion in allowed claims.

In sum, because SIPA section 8(c)(3) only authorizes the Trustee to utilize the Bankruptcy Code avoidance provisions when customer property is insufficient to pay all

customer claims, and because the Trustee has not adequately alleged such a shortfall, Count One must be dismissed.

**IV. Count Seven fails to state a claim to recover alleged subsequent transfers because the Complaint does not allege “the who, when, and how much” of any purported transfers.**

Count Seven fails to state a claim to recover alleged subsequent transfers and, therefore, should be dismissed. Even if Count One states a claim for actual fraudulent transfer under the Code, which it does not, the only *initial* transfers it seeks to avoid are the Two-Year Transfers. Thus, even if Count One survives, the Trustee may only recover *subsequent* transfers traceable to the Two-Year Transfers.

To adequately state a claim to recover subsequent transfers under Code section 550, the Trustee must meet the Federal Rule of Civil Procedure 8(a) notice-pleading standard. *Picard v. Cohmad Sec. Corp. (In re Bernard L. Madoff Inv. Sec. LLC)* (“*Cohmad*”), 454 B.R. 317, 340 (Bankr. S.D.N.Y. 2011). While the Trustee need not plead “dollar-for-dollar accounting of the exact funds at issue,” the Complaint “must set forth ‘the necessary vital statistics — the who, when, and how much’ of the purported transfers.” *Cohmad*, 454 B.R. at 340 (quoting *Gowan v. Amaranth LLC (In re Dreier LLP)*, 452 B.R. 451, 464 (Bankr. S.D.N.Y. 2011)). At the very least, the trustee “must plead a statement of facts that adequately apprises the [defendants] of the [subsequent transfers] he seeks to recover.” *Cohmad*, 454 B.R. at 340 (internal quotations omitted).

The Complaint does not necessarily allege that *any* of the Two-Year Transfers were subsequently transferred, but only vaguely alleges that “Upon information and belief, some or all of the *Transfers* were subsequently transferred by the Initial Transferee Defendants to the Subsequent Transferee Defendants.” (Complaint ¶ 54 (emphasis added).) Because the Trustee defines the term “Transfers” to refer collectively to both the Six-Year and Two-Year Transfers, it is unclear whether the Trustee is alleging that any of the Two-Year Transfers

were subsequently transferred. The most that can be gleaned from the Complaint is that *some or all* of the Two-Year Transfers *may* have been subsequently transferred. It is hard to imagine how a claimant could allege subsequent transfers more equivocally or less definitely than this. The Complaint's indefiniteness is not due to lack of discovery—Defendants provided the Trustee with over 7,749 pages of pre-Complaint discovery. Because, despite having ample time and information, the Trustee fails to set forth the necessary vital statistics—the who, when, and how much of any subsequent transfers, the Trustee's claim to recover subsequent transfers should be dismissed with prejudice.

**A. The Complaint's allegations of "who" made and received any alleged subsequent transfers are impermissibly vague.**

The Trustee not only fails to concretely allege that any of the Two-Year Transfers were subsequently transferred, but also fails to identify who made or received such transfers. Even assuming that the Non-Exempt Trust was the initial transferee of the Two-Year Transfers, the Trustee equivocates as to whether the Non-Exempt Trust subsequently transferred the Two-Year Transfers to the Subsequent Transferee Defendants "directly or indirectly." (See Complaint ¶ 109 (alleging that the Initial Transferee Defendants "directly or indirectly" transferred funds to Subsequent Transferee Defendants).) Based on such vague allegations, the Subsequent Transferee Defendants cannot ascertain whether they are alleged to have received subsequent transfers from the Non-Exempt Trust or from a third party.

Additionally, the Complaint does not specify which, if any, of the eleven Subsequent Transferee Defendants are alleged to have received subsequent transfers of the Two-Year Transfers. Because the Complaint does not allege who made or received any alleged subsequent transfers, Count Seven should be dismissed.

**B. The Complaint does not allege “when” any alleged subsequent transfers occurred.**

The Complaint does not state when any alleged subsequent transfers occurred. Not only does the Complaint fail to specify the day and month, it also fails to specify the year. Considering that the first Two-Year Transfer is alleged to have been made in December, 2006, and that the Complaint was filed in December, 2010, there is a four-year window when any alleged subsequent transfers could have occurred. Such vague allegations do not reasonably apprise Defendants of when the subsequent transfers occurred.

**C. The Complaint does not allege “how much” was subsequently transferred.**

The Complaint does not allege how much, if any, of the Two-Year Transfers were subsequently transferred. Rather, the Complaint merely alleges that “some or all” of the initial transfers may have been subsequently transferred. (See Complaint ¶ 54.) This allegation makes it impossible to glean not only the total amount of subsequent transfers the Trustee seeks, but also how much he seeks from each individual transferee. This Court has previously held that such “lumping together” of transfers and transferees does not meet the Rule 8(a) notice-pleading standard. See *Buchwald Cap. Adv. LLC, v. JP Morgan Chase Bank, N.A. (In re M. Fabrikant & Sons, Inc.)*, 2009 Bankr. LEXIS 3606, \*47–49 (Bankr. S.D.N.Y. Nov. 10, 2009) (subsequent transfer claims dismissed where complaint “failed to identify which [subsequent transferee] received a particular transfer, and instead, lumped the transfers and the transferees together”). Because the Complaint fails to allege (1) how much (if any) of the Two-Year Transfers were subsequently transferred or (2) how much (if any) each Subsequent Transferee Defendant received, Count Seven should be dismissed.

**D. The Complaint’s threadbare allegations of subsequent transfers are indistinguishable from allegations deemed inadequate in other proceedings.**

The Complaint’s threadbare allegations of subsequent transfers are indistinguishable from allegations held inadequate in other proceedings. For example, the trustee in *Dreier*

recently sought to claw back, among other things, alleged subsequent transfers. *In re Dreier LLP*, 452 B.R. at 465. The *Dreier* court held insufficient the complaint's allegations that "it is likely that [the initial transferee] invested the money . . . [in] Amaranth LLC" and "[o]n information and belief, [the initial transferee] transferred its Transfers to Amaranth LLC." *Id.* (emphasis in original). The *Dreier* trustee did not allege the dollar amounts of the alleged subsequent transfers, but merely asserted that she sought to recover "some" of the money initially transferred. *Id.* The court held that the complaint's "bald assertions" — without "specific facts to back up [its] allegation[s]" — failed to meet the Rule 8(a) notice-pleading standard. *See id.* Accordingly, the court dismissed the Complaint against the alleged subsequent transferee in its entirety. *Id.*

As in *Dreier*, the present Complaint fails to allege the purported subsequent transfers' (1) amounts or (2) dates. In fact, the Trustee's Complaint here contains even *fewer* details than the *Dreier* complaint, which was itself deemed inadequate. At least the *Dreier* complaint described alleged subsequent transfers, clearly identifying (1) the transferor, (2) the transferee, and (3) the nature of the transfers. *Id.* at 464–65 (describing subsequent transfers as investments that initial transferee made in Amaranth LLC). The present Complaint does not even contain *Dreier*'s minimal (and ultimately inadequate) specificity.

In Trustee Picard's suit against Madoff's family members, Judge Burton R. Lifland dismissed subsequent transfer allegations identical to those in the current Complaint. *Picard v. Madoff (In re Bernard L. Madoff Investment Sec. LLC)* ("Madoff"), 458 B.R. 87 (Bankr. S.D.N.Y. 2011). Like the current Complaint, the *Madoff* complaint alleged: "On information and belief, some or all of the transfers were subsequently transferred by one or more [of the Defendants] to another Family Defendant, either directly or indirectly." *Madoff*, 458 B.R. at 119–20; *compare with* Complaint ¶ 54 ("Upon information and belief, some or all of the Transfers were subsequently transferred by the Initial Transferee Defendants to the Subsequent Transferee Defendants . . ."). Judge Lifland noted that this

allegation did not provide “any sort of estimate of the amount of the purported Subsequent Transfer, or when or how such Transfer occurred.” *Id.* at 120. In *Madoff*, Judge Lifland held that the allegations’ insufficiencies and vagueness warranted dismissal:

While the Complaint’s failure to indicate specific amounts does not in and of itself warrant dismissal of the Subsequent Transfer claims, its failure to provide even a modicum of specificity with respect to the Subsequent Transfers so as to put the Defendants on notice as to which ones the Trustee seeks to recover does so warrant.

*Id.*

Here the Complaint makes allegations identical to those found deficient in *Madoff*—that the Initial Transferee Defendants transferred “some or all” of the initial transfers “directly or indirectly to the Subsequent Transferee Defendants.” (See Complaint ¶¶ 54, 108–09.) This vague statement fails to give Defendants “even a modicum of specificity” that would give notice as to which transfers the Trustee seeks to avoid. As in *Madoff*, the Trustee’s subsequent transfer claim should be dismissed.

**E. Unlike *Cohmad* and *Merkin I*, the Complaint does not allege that the subsequent transfers were fixed-rate commissions or fees, providing no means to calculate the allegedly transferred amount.**

The current Complaint contains far fewer details than those Judge Lifland held sufficient in *Cohmad* and *Merkin I*. In *Cohmad*, the complaint alleged that Madoff transferred lump-sum commission payments to Sonny Cohn, who then divided the commissions among his employees. *Cohmad*, 454 B.R. at 327. The *Cohmad* complaint attached a payment schedule that listed the employees’ commissions during specific time periods. *Id.* at 327–28. Similarly, the complaint in *Merkin I* listed in detail the initial transfers made to three investment funds and further alleged that the funds subsequently transferred “tens of millions of dollars in management and performance fees” to J. Ezra Merkin. *Picard v. Merkin (In re Bernard L. Madoff Inv. Sec. LLC)* (“*Merkin I*”), 440 B.R. 243, 269–70 (Bankr. S.D.N.Y. 2010). Judge Lifland noted that “[s]uch commissions or fees were

paid in the predetermined amounts, as described in the Funds' Offering Memoranda, of 1% of the net asset value, and 20% of the increase in value, of [the initial transferee funds]." *Id.* at 270. Considering the complaints in both *Cohmad* and *Merkin I* provided a means by which to calculate the amount of alleged subsequent transfers, Judge Lifland found the Trustee's allegations sufficient. *See id.*; *Cohmad*, 454 B.R. at 341.

Here, the Complaint falls far short of the specificity in *Cohmad* and *Merkin I*—it does not allege whether the subsequent transfers were fixed-rate fees, and it provides no other means (e.g., a payment schedule) of calculating the amount of the transfers. Accordingly, the Trustee's subsequent transfer allegations in the current proceeding do not meet the Rule 8(a) notice-pleading standard and must be dismissed.

**V. Count Eight fails to state a claim for disallowance of related account customer claims and should be dismissed.**

The Complaint alleges that "Related Account Customer Claims (Claim Nos. 003156 for Shirley Fiterman; 003077 for Fairway Partnership II; and 003162 for MSM Investment) should not be allowed pursuant to section 502(d) of the Bankruptcy Code." (Complaint ¶ 114.) Defendants were recently informed that MSM Investment's claim has been or will be allowed, leaving only the claims of Shirley Fiterman and Fairway Partnership II ("Fairway II") at issue.

Section 502(d) provides that "the court shall disallow any claim of any entity from which property is recoverable under [section 550] or that is a transferee of a transfer avoidable under [section 548]." 11 U.S.C. § 502(d). Because, for reasons set forth above, the Trustee has failed to adequately plead that Shirley Fiterman received any avoidable transfers, section 502(d) is inapplicable and Shirley Fiterman's claim should be allowed.

As to Fairway II, the Trustee alleges that "Defendant Shirley Fiterman and Subsequent Transferee Defendants Steven Fiterman, Valerie Herschman, Karen

Wasserman, Lynn Guez, Stephanie Fiterman, Miles Q. Fiterman II, and Matthew Fiterman, either directly or indirectly as members of MSM Investment and Fairway II, are the absolute owners of one or more of the Related Accounts and/or have beneficial or equitable interests in one or more of the Related Accounts.” (Complaint ¶ 113.) Even assuming the truth of this allegation, for the purposes of this motion, the Trustee has failed to adequately plead that any Defendant received an avoidable transfer. Accordingly, section 502(d) is inapplicable. Additionally, although Fairway II is not a party to this action, it is a necessary party because disposing of Fairway II’s claim in its absence would impair its ability to protect its interests. *See* Fed. R. Civ. P. 19(a). Because the Trustee has not joined Fairway II as a party to this action, the Trustee’s attempt to disallow its claim should be dismissed. *See* Fed. R. Civ. P. 19, 12(b)(7). Accordingly, Count Eight must be dismissed in its entirety.

### CONCLUSION

As discussed above, Code section 546(e) bars the Trustee’s state-law and constructive-fraudulent-transfer claims—Counts Two through Six. Further, because the Complaint demonstrates that the Non-Exempt Trust is a good-faith financial participant, Counts One and Seven fail to state a claim for avoidance and recovery of actual fraudulent transfers. Counts One and Seven additionally fail to state a claim because the Trustee has not sufficiently alleged that customer property is currently insufficient to satisfy all allowed customer claims—a prerequisite to standing under SIPA. The Trustee’s claims to avoid alleged subsequent transfers under Count Seven are also defective in that they fail to allege the necessary vital statistics of the alleged subsequent transfers. Lastly, because the Trustee has not sufficiently alleged that any transfers from BLMIS to Defendants were avoidable, Count Eight fails to state a claim for disallowance of related customer claims under Code section 502(d). In light of these deficiencies, the Complaint should be dismissed in its entirety.

April 17, 2014

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